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In the Supreme Court

OF THE

United States

October Term, 1934

ARTHUR MATTSON,
Appellant,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON.

No. 29

Appeal from the Supreme Court of the State of Washington

BRIEF OF APPELLANT

OPINION

The opinion of the Supreme Court of the State of Washington herein is reported in 76 Wash. Dec. 266. (Tr., pp. 12 to 14.)

STATEMENT OF THE CASE

Appellant Mattson injured his arm in extra hazardous work covered by the compensation act of Washington on the 7th of February, 1927 (Tr., p. 1; Tr., p. 13), for which he was paid $240.00 permanent partial disability (Tr., p. 3) on the 17th of January, 1928. Thereafter, on May 10, 1933 (Tr., p. 5), he made proper application to the Department of Labor and Industries for a reopening of his case, alleging that the arm had become wholly useless, which was denied (Tr., p. 5) because the statute in question prohibited the allowance thereof. Thereafter (Tr., p. 5) appellant petitioned for a rehearing of said order before the joint board (Tr., pp. 5, 6, 7), alleging that his arm had become totally useless and required medical treatment and alleged that the statute in question, enacted after his injury, deprived him of the contractual right to recover medical attention for his injury and his contractual right to recover full compensation according to the law in force at the time of the occurrence of the injury in violation of section 10 of Article I of the United States Constitution, and deprived him of his vested right to recover full compensation for the effects of the injury according to the law in force at the time of the occurrence thereof, in violation of the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States. From

a denial thereof, Mattson appealed to the Superior Court of the State of Washington for Thurston County (Tr., p. 8), where, on July 5, 1933, after a trial, judgment on the merits went against him, dismissing his appeal and finally terminating the entire controversy (Tr., pp. 9, 10, 11), from which Mattson appealed to the Supreme Court of the State of Washington (Tr., p. 12), where, on February 2nd, the judgment was affirmed (Tr., p. 12) by an opinion by Tolman, Judge, and thereafter, on February 5th, appellant petitioned for a rehearing before the entire court (Tr., p. 15) which was denied March 1, 1934 (Tr., p. 15), and judgment affirming the judgment of the trial court and dismissing the proceeding in the Supreme Court was entered on March 1st, from which order an appeal to this court was allowed by the Chief Justice of the Supreme Court of the State of Washington March 7th. (Tr., p. 21.)

The statute as it existed at the time of the injury, which is Section 2, Chapter 136 of the Session Laws of 1923, page 397, was as follows:

> "(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the department may, upon the application of the beneficiary or upon its own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment."

That was amended by subdivision (h), Section 4, Chapter 310 of the Session Laws of 1927, pages 844-5, which, so far as pertinent, is as follows:

"(h) If aggravation, diminution, or termination of disability takes place or be discovered after the rate of compensation shall have been established or compensation terminated, in any case the director of labor and industries, through and by means of the division of industrial insurance, may, upon the application of the beneficiary, made within three years after the establishment or termination of such compensation, or upon his own motion, readjust for further application the rate of compensation in accordance with the rules in this section provided for the same, or in a proper case terminate the payment: *Provided,* Any such applicant whose compensation has heretofore been established or terminated shall have three years for the taking effect of this act within which to apply for such readjustment."

SPECIFICATION OF ERRORS

POINT NO. 1

That the statute in question, to wit: subdivision (h) of Section 4 of Chapter 310 of the Session Laws of the State of Washington of 1927, page 844, impaires the contractual right of the appellant to recover full medical and hospital treatment on account of the injury sustained according to the law in force at the time of the injury, to wit: subdivision (h) of Section 2 of Chapter 136 of the Session Laws of the State of Washington of 1923, page 397, in violation of the appellant's right guaranteed by Section 10 of Article I of the Constitution of the United States of America.

POINT NO. 2

That the statute in question, subdivision (h) of Section 4 of Chapter 310 of the Session Laws of the State of Washington of 1927 deprived appellant of his vested right to recover full compensation for the effects of the injury as the law existed at the time of the injury, to wit: subdivision (h) of Section 2 of Chapter 136 of the Session Laws of the State of Washington of 1923, page 397, in violation of the appellant's rights under the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States of America.

SUMMARY

The Industrial Insurance Act of Washington, in common with compensation acts generally, allows compensation only for the disability existing at the time the award is made, leaving for future adjustment any change in the compensation because of an increase or decrease in the disability. In this particular instance, at the time of the injury the workman was given the right to recover compensation for an increase of his disability. By the amendment of 1927, this right was withdrawn unless the disability developed within three years. The right and not the remedy was destroyed which the appellant complains violated his rights guaranteed under the contract clause of Section 1, Article X of the Federal Constitution, and destroyed his right, which vested at the time of the injury, to recover full compensation for the disability resulting therefrom.

ARGUMENT

COMMON GROUNDS

There may be certain common grounds upon which argument will be made unnecessary by a fair and frank statement of the appellant's conception of the problems presented here: First, that a statute is not void under the constitutional guarantees herein relied upon simply because it may be retroactive or retrospective in operation but that it is void if it deprives parties of vested rights or impairs contractual obligations; second, that no one has a vested right in any rule of law operating *in futuro,* and consequently we recognize the uniformly accepted rule that under the constitutional guarantees relied upon by the appellant that the Legislature may with impunity change, amend, alter or repeal statutes relating to remedies, among which are statutes of limitation. We specifically recognize that the Legislature may impose a new or different limitation upon the assertion of the right after the occurrence of any injury, but the question here presented is primarily whether this statute relates to the right or to the remedy. The respondent neither at the trial nor in the Supreme Court of Washington undertook any discussion of the distinction between rights and remedies, nor did the Supreme Court of Washington in its opinion in the case discuss the well-recognized distinction between rights and remedies, but placed its decision solely upon the ground that the rights under the industrial insurance were purely statutory and consequently could be given or taken away at any time by

the Legislature without offending against the constitutional guarantees upon which the appellant relies.

RIGHT AND NOT REMEDY INVOLVED

The distinction between rights and remedies is aptly described in *Chelentis v. Luckenbach Steamship Co., Inc.,* 247 U. S. 372, 384, as follows:

> "The distinction between rights and remedies is fundamental. A right is a well founded or acknowledged claim; a remedy is the means employed to enforce a right or redress an injury. . . ."

This is not an additional method to review an original order of the administrative tribunal of the State of Washington administering its Industrial Insurance Act. It concerns a primary right to recover compensation for an increased or added disability occurring after the original closing of a claim. This is demonstrated by a consideration of but two cases from the Supreme Court of Washington, *Nafus v. Department of Labor and Industries,* 142 Wash. 48, and *Fuller v. Department of Labor and Industries,* 169 Wash. 362. In the *Nafus* case, 142 Wash. 48, the court very specifically announced that if an appeal were not taken from a departmental decision within the time specified that such decision could not be reviewed after the expiration of that time by filing an application to reopen the claim. In *Fuller v. Department of Labor and Industries,* 169 Wash. 362, the court decided that under the subdivision herein under consideration no compen-

sation could be awarded for any period prior to the filing of the application thereof.

A comparison of the basis of industrial insurance awards and the common law measure of damages for personal injuries proves that the subdivision in question concerns the right and not the remedy. The common law measure of damages for personal injuries not only comprehends past and present pain, suffering and physical impairment but future pain, suffering and physical impairment as well. Because of the rule against splitting a cause of action, the common law insisted upon a complete and final adjudication of all the rights and liabilities of the parties in one action. In some instances, because of the more or less speculative character of the evidence as to future disability, great injustice was done to both parties. Frequently a recovery was allowed because of a belief that there would be extensive future disability, which subsequent events proved excessive; and, on the other hand, in the absence of satisfactory proof as to future disability, damages therefor were denied in meritorious cases and subsequent events demonstrated the inadequacy of the verdict.

No such difficulty was encountered in drafting industrial insurance acts. Under industrial insurance and workmen's compensation acts, the final award uniformly comprehends the then existing disability only, that is, the only matter taken into consideration in fixing a final award is the disability actually existing at that time, even though it be reasonably certain

that the workman will, as a result of the accident, have a very much greater disability at such indefinite time in the future.

To overcome the common law deficiency, a continuing jurisdiction is vested in the tribunals administering such acts authorizing them to award additional compensation for any future increase in the disability or, on the other hand, to diminish or terminate compensation in the event the disability decreased or disappeared. The basic theory is that the continuing jurisdiction and the right of the workman under the statute in question permits a precise and accurate determination by the actual developments in each case as they occur, rather than leaving the matter to the speculation and conjecture of the common law as to future probabilities; in other words, when the award is made the administrative tribunal determines what the disabilty is at the then present time and does not undertake to forecast the future. That is aptly illustrated by the following compensation cases:

The Supreme Court of Oklahoma in *Choctaw Portland Cement Co., et al., v. Lamb, et al.*, 79 Okl. 109, 110, 189 Pac. 750, 751, very accurately summed up the philosophy of the Oklahoma counterpart of our subdivision (h) in the following language:

> "It is a well-known fact that the nature and probable effect of an injury, in many cases, cannot immediately be determined by the most proficient physicians or surgeons, and we are confident that the Legislature had this fact in mind when it provided in section 14, art. 4, for subsequent physical examinations, and conferred jurisdiction on

> the commission to modify or change its former findings or orders. The provision thus serves as a protection both to the employer and employe, and enables the commission to change its findings and orders to effectuate justice, where the amount previously awarded was either too large or too small, or where the commission had previously erred in fixing the compensation through mistake, or because the fraud practiced upon it. . . ."

See also the subsequent investigation of the question by the same court in *Loffland Bros. Co. v. Velvin,* 3 Pac. (2d) 855, and the very admirable explanation by the Supreme Court of Oregon of the identical language in their statute in *Chebot v. State Industrial Accident Commission,* 106 Ore. 660, 212 Pac. 792.

While the purpose of the section was not specifically discussed, the decision of this court in *Mullen v. Department of Labor and Industries,* 157 Wash. 329, 332, construing it, is quite illuminating.

See also *Schmeiling v. Department of Labor and Industries,* 167 Wash. 692, 695.

In *Kelly v. Department of Labor and Industries,* 172 Wash. 525, 528, the court again had occasion to consider the meaning of the subdivision in question and in the course of the opinion stated:

> "Upon the merits of the case, a special interrogatory to the jury as to whether respondent's disability, as a result of the injuries received by reason of the accident on February 27, 1926, had become aggravated since the claim was closed by the department on December 21, 1928, was answered in the affirmative. . . ."

The Supreme Court of Colorado stated the nature of the right granted by the corresponding provision of their act in *Employers' Mutual Insurance vs. Industrial Commission of Colorado,* 65 Colo. 283, 286, 176 Pac. 314, in the following language:

> ". . . When the award of August, 1916, was made the full extent of claimant's disabilities were not ascertained, nor could they be then ascertained and compensated with justice either to the claimant or the insurer. As was said in Lamieux's Case, 223 Mass. 346, 111 N. E. 782:
>
> " 'It is common knowledge that the result of physical injuries are very often not determinable at the time they are received. In the common course of events, a requirement that such results shall be stated is to demand the performance of an impossible thing.'
>
> "The finding and award of August, 1916, was not final in the sense that, regardless of the future physical condition of claimant, neither he nor the insurer should be permitted to show such physical change. For this reason the commission not only had the right, but it was its legal duty, to retain jurisdiction of the case for further action and award if the facts should so warrant. . . ."

In *Casparis Stone Co. v. Industrial Board of Illinois,* 278 Ill. 77, 85, 86, 115 N. E. 822, 825, the Supreme Court of Illinois explained the issue on such an injury:

> ". . . He should only have been permitted to show the changes in his condition since the former hearing, on which was based the award of the arbitrators."

The New York Court of Appeals in *Boscarino v. Carfagno & Dragonette, Inc.,* 220 N. Y. 323, Ann. Cas. 1918A, 530, 115 N. E. 710, said:

"If in the future the impairment of the claimant's vision should increase, the law gives the Industrial Commission the power to reconsider the award."

This section is not one of limitation but one which vested in the appellant at the time of his injury a right to additional and further compensation in case his disability, as the result of the accident, at any time should increase, and the amendment denies compensation for any increase in the disability developed more than three years after the closing of the claim. Within the meaning of the terms as defined by the Supreme Court of the United States in the *Chelentis* case, there can be no doubt but that this original section created a substantial right and did not relate to the remedy. While a comparison of the principles of the common law measure of damages and the principles underlying the section in question make it plain that a right and not a remedy is involved, the Supreme Court of Nevada, in construing a similar statute, has so aptly spoken that it is impossible to refrain from at least a passing reference to it. In that case, *Virden v. Smith, et al.,* 210 Pac. 129, 130, that court said:

". . . The amendment empowered the commission to award a larger compensation during the life of an injured person, and prevented it from making the award as low as the minimum fixed by the statute amended. In addition the nurse allowance, which respondent claims, was provided. Clearly these changes are not formal, but substantial. They pertain to no matters of procedure. *They concern the right, and not the*

remedy. If the amendatory statute be construed so as to entitle the respondent to recover under its nurse allowance provision from the date of enactment, the effect of the statute is to enlarge the right he had at the time he received the injuries."

The award in this case (Tr., p. 3) disclosed by the final settlement notice was $240.00 for eight degrees of permanent partial disability, whereas the statute (Sec. 7679, Rem. Rev. Stat.) specifically makes an award of $3000.00 for the loss of an arm at the shoulder and $2280.00 for the loss of an arm at or above the elbow. The allegation is that the arm is permanently and totally useless (Tr., p. 5).

In the original case involving the constitutionality of the Industrial Insurance Act of Washington *(Mountain Timber Co. v. Washington,* 243 U. S. 219), as in *New York Central R. R. Co. v. White,* 243 U. S. 189, this court said:

"Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? . . . Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that, unless it be so, the corresponding burden upon the industry cannot be regarded as excessive if the State is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we said in New York C. R. Co. v. White, that, in sustaining the law, we do not intend to say that any scale of compensation, however insignficant on the one hand or onerous on the other, would be supportable, and that any question of that kind may be met when it arises."

The award was for eight degrees permanent partial disability to the arm, for which the statutory schedule is $240.00, the amount paid. The statute awards for the loss of the arm the sum of $3000.00, for the loss of the arm at or above the elbow $2280.00. There is a sentence in the paragraph succeeeding the schedule of awards in the statute as follows:

> ". . . That for disability to a member not involving amputation, not more than three-fourths (¾) of the foregoing respective specified sums shall be paid. . . ."

In this particular instance, Mattson received approximately ten per cent of what he would have been entitled to had the disability attained its maximum development at the time of the closing of the claim. However, because the amendment assailed intervened between the time of the injury and the time when his disability attained its maximum development, the appellee is prohibited from making any allowance for the disability occurring more than three years after the enactment of the section in question. That time expired some time in June, 1930. In other words, under the law as it existed at the time of the occurrence of the injury, Mattson was entitled to full compensation for any disability which resulted from the injury, irrespective of the time of development, but under the statute in question, because the disability did not develop until after the time fixed in the statute, the right to recover compensation for the increase in his disability occurring after June of 1930, on the one hand, or

the right to make an award therefor, on the other, is withdrawn.

The converse of the situation here presented indicates with great force that the subdivision relates to the right and not to the remedy. It was aptly said in *Mountain Timber Co. v. Washington:*

> "While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531, 544; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers."

If at the time of the occurrence of the injury compensation for any increase in disability was limited to developments within three years and subsequently the Legislature established the workman's right to recover for an increase in disability, irrespective of when it developed, and that of necessity there was a corresponding increase in the employer's premium, could the Legislature then within the constitutional guarantees herein relied upon exact from any employer an added premium for which he was not liable at the time of the occurrence of the injury? The fundamental basis upon which this court said that the requirements of the 14th Amendment were satisfied in the *Mountain Timber Company* case, so far as the employer was concerned, is that in return for the payment of premiums

he receives immunity from suit. Clearly, the exaction in such an event would be a taking without any corresponding compensation to the employer and consequently prohibited by the due process clause. It would be a taking of the property of one and placing it in the pocket of another by legislative action.

A VESTED RIGHT MAY BE ACQUIRED UNDER A STATUTE

The Supreme Court of Washington placed its decision sustaining the validity of the statute in question as against the asserted invalidity under the several constitutional guarantees relied upon solely upon the ground that this and all rights under the Industrial Insurance Act are statutory and may be withdrawn at any time by the Legislature. No attempt was made to sustain it upon the ground that the statute related to a remedy and not to a right. The language of the opinion is:

> "In each of the first two cases cited will be found a considerable discussion leading to the holding that workmen's rights under the law existing at the time of the injury *are purely statutory rights and may be taken away at any time by the legislature* and therefore the limitation contained in the act of 1927, which is here complained of, is purely remedial and destroys no vested right."

In only two of the cases cited by the court to sustain its conclusion, *Robinson v. McHugh,* 158 Wash. 157, 160 Wash. 703, and *Denning v. Quist,* 160 Wash. 681, 172 Wash. 83, was the broad question either briefed

or considered by the court and in none was the precise question here presented under consideration. In the other cases the question was neither briefed, argued at the bar or discussed in the opinion. Both *Robinson v. McHugh* and *Denning v. Quist* concerned actions against third party and not rights to recover compensation from the accident fund. In *Denning v. Quist,* 160 Wash. 681, the court stated its view in very broad language:

> "This right being purely statutory, it was competent for the legislature to limit the same as was accomplished by the 1929 amendment, supra, and we are satisfied that the correct rule was laid down by this court in the case of Robinson v. McHugh, supra."

The Supreme Court of Washington many years ago stated similar views in *Ettor v. Tacoma,* 57 Wash. 50, which was reversed on that very point by this court in Ettor v. Tacoma, 228 U. S. 148. No appeal was taken in either *Denning v. Quist* or *Robinson v. McHugh* to this court, for the Legislature apparently recognized the error of the Supreme Court and reversed the two decisions by an amendment, which was given effect by the Supreme Court itself in the subsequent case of *Denning v. Quist,* 172 Wash. 83.

Robinson v. McHugh, 158 Wash. 157, was based upon school cases which are very forcibly distinguished by Judge Holcomb in the dissenting opinion on the ground that the sovereign may withdraw its consent to be sued with impunity.

That is not the case here because the operation by

the state of a casualty insurance company is a proprietary and not a sovereign function, although the Supreme Court of Washington in *State v. Vinther,* 76 Wash. Dec. 297, held that it was. This overlooks entirely the conclusion of this court in *Ohio v. Helvering,* decided May 31, 1934, 54 Supt. Ct. Rep. 725, and *South Carolina v. United States,* 199 U. S. 437.

While there have been changes since, the characteristic features of the Washington Industrial Insurance Act are essentially the same as when examined by this court in *Mountain Timber Co. v. Washington,* 243 U. S. 219. It is a compulsory state monopoly. All employers in extra hazardous industry are obliged to contribute to a fund in the state treasury styled "the accident fund," out of which exclusively all compensation for injuries received in the course of employment in extra hazardous industry is paid. It is precisely the same business conducted by private casualty companies elsewhere.

> "Of the 49 compensation acts listed in Table 4 [Appendix, p. 45] (the United States Civil Employees' Act is not listed), 17 are compulsory and 32 are elective. A State fund insurance system exists in 19 of the States listed (the Tennessee fund is limited to coal mining only). Of the 19 States having State fund insurance systems, 7 are exclusive, whereas in 12 the State fund competes with private insurance companies." (Bulletin 496, United States Department of Labor, Bureau of Labor Statistics.)

In other words, in all but nineteen of the acts, including Alaska, the District of Columbia, Hawaii,

Philippine Islands, Porto Rico and the United States Harbor Workers and Longshoremen's Act, the insurance is provided by private casualty companies or self-insurers and in twelve of the nineteen states having state insurance the state fund is in competition with private insurance companies.

It is beyond question that the regulation of the rights and liabilities for injuries in extra hazardous employment is within the exclusive province of the sovereign, but when the state itself engages in the insurance business it enters a field historically occupied by private enterprise, and does so upon the same terms and conditions as any private company. There can be no distinction drawn between the operation of this state insurance system and the operation of the state owned liquor stores of Ohio which received the attention of this court in *Ohio v. Helvering,* 54 Sup. Ct. Rep. 725, where the court very plainly said that the regulation of the liquor traffic was a sovereign function, but the operation of liquor stores by the state was not the business of the state. The court there said: -

> ". . . That challenge seeks to invoke a principle, resulting from our dual system of government, which frequently has been announced by this court and is now firmly established,—that 'the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are . . . exempt from taxation by the United States.' . . . But, by the very terms of the rule, the immunity of the States from Federal taxation is limited to those agencies which are of a governmental character. Whenever a State engages in a business of a private nature,

it exercises nongovernmental functions, and the business, though conducted by the State, is not immune from the exercise of the power of taxation which the Constitution vests in the Congress. This court, in South Carolina v. United States, 199 U. S. 437, 26 S. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737, a case in no substantial respect distinguishable from the present one, definitely so held. Compare Board of Trustees of the University of Illinois v. United States, 289 U. S. 48, 59, 53 S. Ct. 509, 77 L. Ed. 1025.

"The South Carolina Case arose under a State statute, which, like the one at bar, created a monopoly and prohibited the sale of intoxicating liquors except at dispensaries to be operated by the State. This court, while sustaining the validity of the statute and fully accepting the rule that the national government was without power to impose a tax in any form which had the effect of prohibiting the full discharge by the State of its governmental functions, held that 'whenever a State engages in a business which is of a private nature that business is not withdrawn from the taxing power of the Nation.' The decision sustained the identical tax provisions involved in the present case, and, therefore, we follow it as controlling.

"A distinction is sought in the fact that after that case was decided the Eighteenth Amendment was passed, and thereby, it is contended, the traffic in intoxicating liquors ceased to be private business, and then with the repeal of the amendment assumed a status which enables a State to carry it on under the police power. The point seems to us altogether fanciful. The Eighteenth Amendment outlawed the traffic, but, certainly, it did not have the effect of converting what had always been a private activity into a governmental function. The argument seems to be that the police power is

elastic and capable of development and change to meet changing conditions. Nevertheless, the police power is and remains a governmental power, and applied to business activities is the power to regulate those activities, not to engage in carrying them on. Rippe v. Becker, 56 Minn. 100, 111, 112, 57 N. W. 331, 22 L. R. A. 857. If a State chooses to go into the business of buying and selling commodities, its right to do so may be conceded so far as the Federal Constitution is concerned; but the exercise of the right is not the performance of a governmental function, and must find its support in some authority apart from the police power. When a State enters the market place seeking customers it divests itself of its *quasi sovereignty pro tanto,* and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned. . . ."

But even assuming that the operation by the state in this instance may be said to be a sovereign function (which appellant of course denies) and it should follow that the state may then withdraw its consent to be sued, still under the constitutional guarantees relied upon the state may not destroy the right, but only the remedy, and in this instance the state has not undertaken to withdraw its consent to be sued but has actually destroyed the right. That was determined and condemned by this court in *Lynch v. United States,* 54 Sup. Ct. Rep. 840.

It was held by this court in *Angle v. Chicago, St. Paul etc. Ry.,* 151 U. S. 1, that a cause of action to recover damages for the effects of injury is a vested right. On page 19 the court said:

". . . A right of action to recover damag-

> es for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither the executive nor the legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged. . . ."

It has been conclusively determined that the 14th Amendment applies to rights acquired under a statute and they are not affected by a repeal thereof.

In *Ettor v. Tacoma,* 228 U. S. 148, the Supreme Court of Washington held that the right to recover compensation for damages inflicted upon abutting property granted only by statute could be withdrawn by the state at any time without any violation of constitutional guarantees, but this court took the other view. In that case at the time of the damage the statute authorized a recovery therefor but before judgment the statute was amended, denying the right. The Supreme Court of the United States said:

> "The court below gave a retrospective effect to the amendatory and repealing act by holding that the effect of the repeal was to destroy the right to compensation which had accrued while the act was in force. The obligation of the city was fixed. The plaintiffs in error had a claim which the city was as much under obligation to pay as for the labor employed to do the grading. It was a claim assignable and enforceable by a common law action for a breach of the statutory obligation.
>
> ". . . The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so

vested cannot be defeated by subsequent legislation. . . ."

In *Arnold v. Industrial Commission of Illinois*, 345 N. W. 343, 314 Ill. 251, the Supreme Court of Illinois was called upon to examine this particular question respecting rights under the Workmen's Compensation Act of that state. There the statute, passed after the injury and the award, authorized an employer to secure a review of the award in the event that the injured employee recovered in whole or in part for the disability from which the award was made. The court there said:

> "No one has a vested right in a public law, but the legislature may repeal or amend all legislative acts not in the nature of contracts or private grants. Such repeal or amendment, however, cannot have the effect of extinguishing rights which have been acquired under the law. (Dobbins v. First Nat. Bank, 112 Ill. 553.) The Legislature may adopt valid acts affecting practice and procedure where no vested right has accrued, (Chicago v. Industrial Commission, 292 Ill. 409, 127 N. E. 46) but a judgment is a vested right of property and cannot be destroyed or diminished by a retroactive statute (Merchants' Bank v. Ballou, 98 Va. 112, 44 L. R. A. 306, 81 Am. St. Rep. 715, 32 S. E. 481; 6 R. C. L. Sec. 307, p. 319). A statute can only be given a retroactive effect where it does not impair contracts or divest vested rights. Lane's Appeal, 57 Conn. 182, 4 L. R. A. 45, 14 Am. St. Rep. 94, 17 Atl. 926."

The Supreme Court of Minnesota in *Regina Warner v. Arthur F. Zaiser*, 184 Minn. 598, 601, 239 N. E. 761, said:

"The provisions of the workmen's compensation law do not become fixed as to interested parties at the time the employment begins. The obligations and rights of the parties as to weekly compensation and other benefits to the employe do become fixed at the date of a compensable accident; as to the benefits and liabilities arising because of the employe's death, they became fixed at the time of the death. The Legislature may change the scale of weekly or other benefits prior to the occurrence of the accident; it may change the benefits to be received by the widow of an employe prior to the death. The rate of compensation, whether for injury or death, may not be changed after the event takes place that fixes the rights of the parties under the law in force at that particular time."

The Supreme Court of Michigan in *Cusick v. Feldpausch,* 243 N. W. 226, considered whether a statutory cause of action was a vested right. That was a case of the statute giving a guest a right of action for injuries received in an automobile accident. The court announced its conclusions in the following language:

"In Ettor v. City of Tacoma, 228 U. S. 148, 33 Sup. Ct. 428, 57 L. Ed. 773, a statute gave compensation to abutting property owners for damages due to change of grade of a street. After the right to compensation had accrued, the statute was repealed, held, the claim was not affected. See, also, Bryson v. Hines, (C. C. A.) 268 Fed. 290, 11 A. L. R. 1438.

"This is not a case involving a mere change in remedy or procedure, and cases cited in that regard are not in point. The statute provides a rule of substantive law. Hawkins v. Ermatinger, 211 Mich. 578, 179 N. W. 249. The effect of the change, if given retrospective effect, would be to deprive

plaintiff and others similarly situated of a right of action. This court has recognized that a common law right of action is property and is entitled to protection. Dunlap v. Railway Co., 50 Mich. 470, 15 N. W. 555. Devlin v. Morse, 254 Mich. 113, 235 N. W. 812. *By the weight of authority, a statutory right of action for damage to person or property, which has accrued, is a vested right and likewise to be protected.*"

In *Leone v. Tricario,* 245 N. Y. S. 81, that court was called upon to determine whether a subsequent act deprived the plaintiff administratrix of her cause of action under the statute as existing at the time of the death by a subsequent statute abolishing the right of action.

"Applying the decision in the above case to the facts in the case at bar, we find that the death in the present case occurred on August 3, 1929, which was three days before the enactment and adoption of the validating acts; that on the 3rd of August, 1929, by reason of the death, there accrued to the plaintiff in this action a vested property right, of which she cannot be deprived, except by due process of law, and certainly not by an legislative body enacting a law retroactive in its terms. . . ."

In *Halling v. Industrial Commission of Utah,* 71 Utah 112, 121, 122, 125, 263 Pac. 78, the Supreme Court of Utah considered whether the right of a widow to recover compensation for herself and minor children on account of the death of the husband and father was a vested right of which they could be deprived by legislation subsequent to the death of the husband and father. The court concluded:

". . . In either case the employee or his dependents are without any remedy, except to accept the compensation provided by law. As we have indicated, the right of an employee's dependents to recover for wrongful injury resulting in the death of such employee *is not the result of any contract.* It is a constitutional right which cannot be denied dependents without their consent, except by a court or other judicial tribunal of competent jurisdiction after notice given and a hearing had. To hold otherwise would be depriving the applicant of property without due process of law.

" 'A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference.' 2 Cooley's Constitutional Limitations, 8th Ed., p. 756, and cases cited in the footnote.

". . .

". . . While a court, or commission exercising judicial functions, may, upon grounds of public policy, limit a person to one opportunity to be heard in a proceeding affecting such person's property rights, neither a court nor other judicial tribunal may deny a person a constitutional right or deprive such person of a vested interest in property without any opportunity to be heard. To do so constitutes taking of property without due process of law. . . ." . . .

The Supreme Court of Utah subsequently in *Buttrey v. Guaranteed Securities Co.*, 78 Utah 39, 50, 51, 300 Pac. 1040, had occasion to consider the question as applied to a right to recover under statute for the sale of the securities, which was subsequently amended, withdrawing the right before the judgment in question was entered. The court there said:

". . . But if the general saving statute was not sufficient, her right of action was nevertheless

within the protection of the constitution and could not be destroyed by legislation. . . . It is a vested right, in the nature of a property right and ought to be regarded as property in the sense that tangible things are property and equally protected by the constitution against arbitrary interference by the legislature. [Citing cases.] There are cases, however, like Wilson v. Head, 184 Mass. 516, 69 N. E. 317, and Willcox v. Edwards, 162 Calif. 455, 123 Pac. 276, Ann. Cas. 1913C 1392, which seem to lay down or recognize the rule that a right which exists wholly by reason of a statute, and which does not arise out of contract or spring from the principles of the common law, cannot become a vested right until it has been reduced to a final judgment, and that it is destroyed by a repeal of the statute upon which it is founded. But we think such cases do not reflect the weight of authority upon this subject, and are not based on the soundest reason. Therefore we do not follow them. We think the rule is correctly stated in the following excerpt from the opinion in Gladney v. Sydnor, 172 Mo. 318, 72 S. W. 554, 60 L. R. A. 880, 95 Am. St. Rep. 517, quoted with approval in Crump v. Guyer, [60 Okla. 222, 157 Pac. 321, 322, 2 A. L. R. 331]: *'Vested rights may be created either by the common law, by statute, or by contract, and it makes no difference as to the method of their creation; they are entitled to the same protection.'*"

In *Wangler Boiler & Sheet Metal Works Co. v. Industrial Commission,* 287 Ill. 118, 121, 122 N. E. 366, the Supreme Court of Illinois characterized the right of the widow to recover compensation under the Industrial Insurance Act of that state in the following language:

". . . The right to damages for death or injury of an employe, at common law or under the

Personal Injuries Act was a vested right. Chicago, Peoria & St. Louis Rd. Co. v. Woolridge, 174 Ill. 330, 51 N. E. 701.

"Compensation under the act in question is analogous to and is to take the place of damages at common law and under the statute. While the right to compensation is not a subject of bequest of the beneficiary, but continues in the dependents of the beneficiary only in the manner provided by said act, yet such right to compensation, when determined according to law, is no less a vested right, and one that can be affected only by the act of the legislature that gave it. . . ."

In *Industrial Commission of Ohio v. Kamrath,* 118 Ohio St. Rep. 1, 160 N. E. 470, the statute had been changed after the injury. The statutory law in force upon the date the cause of action occurs is the measure of the right and is not subject to enlargement or diminishment by the Industrial Commission or the courts at any time, nor by the Legislature itself subsequent to the accrual of the right.

". . . Each successive legislative enactment is intended to make its enforcement more practical and its operation more just, but rights of injured employees and of dependents of killed employees to participate in such fund do not accrue in advance of legislation creating such rights and the legislature is as powerless to create or take away any other legal right in retrospect, under the Workmen's Compensation Law, as it is to create or take away any other legal right in retrospect. . . ."

In *Duff v. Black Diamond Collieries,* 33 S. W. (2d) p. 63, 161 Tenn. 486, at the time of the injury the Com-

pensation Act of Tennessee provided that upon remarriage of the widow the right to compensation terminates. Thereafter the act was amended and provided that upon re-marriage the right to compensation passed to the children. In the circumstances here presented, the widow re-married prior to the amendment and the court held that it could not constitutionally give the amendatory act a retrospective construction.

The Circuit Court of Appeals for the 4th Circuit in *Bryson v. Hines,* 268 Fed. 291, 295, aptly said:

> "As already observed, Circular No. 4 could not take away any cause of action for the negligence of the Atlantic Coast Line Railroad Company, for it existed and was a vested right before that circular was issued. . . ."

In *Double v. Iowa-Nebraska Coal Co.,* 198 Iowa 1351, 201 N. W. 97, speaking of the character of the rights acquired under the Industrial Insurance Act, the court said:

> "We do not view the right of compensation as a vested right, in the sense that, upon death, it passes to his heirs or personal representative. See Smith v. City of Bluffton (Ind. App.), 141 N. E. 532; and note to 29 A. L. R. 1426. It is such a right, however, if accrued, that it could not be legally abridged by subsequent legislation."

See also *Muir v. Louisville-Naches Rd.,* 247 Fed. 888, 897.

A case of great importance is *Lynch v. United States,* 54 Sup. Ct. Rep. 840, decided June 4, 1934. It was there held that the National Economy Act which

repealed all laws granting or pertaining to War Risk yearly renewable term insurance was in violation of the due process clause of the 5th Amendment. The court definitely said:

> ". . . On the other hand, War Risk policies, being contracts, are property and create vested rights . . .
>
> ". . .
>
> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a state, or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. [Citing cases.] When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned as Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the Federal police power or some other paramount power."

RIGHT TO RECOVER FOR INCREASED DISABILITY VESTED

The right of the appellant to recover compensation for an increase in his disability as a result of this accident is a vested right of which he may not be deprived under the 14th Amendment by an act of the Legislature.

The claim was closed with an award of $240.00.

That was all the disability which he had as a result of the accident at that time, January 17, 1928. Section 7679, Rem. Rev. Stat., awards $3000.00 for the loss of the arm at the shoulder [illegible] that an artificial arm cannot be worn or $2280.00 for the loss of the arm at or above the elbow when an artificial arm may be used. The section further limits a recovery not involving amputation to three-fourths of those sums. The allegation in the petition is that the arm is permanently and totally useless and requires medical treatment, which, in this proceeding, must be taken as true because it was decided as a matter of law that appellant had no right to produce his evidence in support of the allegation. The statute by its terms prohibits the appellee from allowing compensation for that increase occurring subsequent to June of 1930. It is a total destruction of the right and does not in any wise relate to the remedy. In other states the legislature has constitutionally withdrawn the remedy; however, in this instance the legislature destroyed the right. The statute denies the appellant the right to recover full compensation for the disability sustained because the aggravation did not occur prior to June of 1930. The award is so inadequate as to be arbitrary and is therefore void under the 14th Amendment. This court appropriately observed in *Mountain Timber Co. v. Washington*, 243 U. S. 219:

> "Secondly, is the tax or imposition so clearly excessive as to be a deprivation of liberty or property without due process of law? If not warranted by any just occasion, the least imposition is oppressive. But that point is covered by what has

been said. Taking the law, therefore, to be justified by the public nature of the object, whether as a tax or as a regulation, the question whether the charges are excessive remains. Upon this point no particular contention is made that the compensation allowed is unduly large; and it is evident that, unless it be so, the corresponding burden upon the industry cannot be regarded as excessive if the state is at liberty to impose the entire burden upon the industry. With respect to the scale of compensation, we repeat what we have said in New York C. R. Co. v. White, that, in sustaining the law, we do not intend to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable, and that any question of that kind may be met when it arises."

That question is here presented for determination. Even under the scale adopted by the legislature, the award is so insignificant that it is arbitrary and void.

The legislature itself says that the compensation to be received by the appellant is three-fourths of $3000.00, or $2250.000, and the amendment in question limits recovery to $240.00.

As against this objection the appellee urges that the right was not vested at the time of the injury because it depended upon the happening of an uncertain future event.

But that overlooks entirely the basic fact that the damage is all the result of the injury, which occurred prior to the enactment of the statute, the force was then in motion, and only its culmination occurred after the passage. The rules were changed while the game

was in progress. If the Compensation Act authorized the consideration of, and the allowance for, future disability at the time of the closing of the claim, a much different question would be presented. But it does not. It allows only for the disability existing at the time of the closing and the amendment under consideration takes from appellant his right to recover compensation for the whole disability resulting from the injury unless it manifested itself prior to June, 1930. The damage was done by the injury, but only the future could disclose its extent. The cases, with but few exceptions, hold that the rights and liabilities of the parties are established at the time of the injury.

In *Lemelin's Case,* 124 Atl. 204, the court announced:

> ". . . . The rights and obligations of the parties are fixed and governed by the statute in force at the time when the accident occurred. Gauthier's Case, 120 Me. 73, 113 Atl. 28; Shink's Case, 120 Me. 80, 113 Atl. 32."

It was the injury which fixed the rights and liabilities of the parties. That was recognized by the Supreme Court of Washington in *Thorpe v. Department of Labor and Industries,* 145 Wash. 498, deciding that the law in force at the time of the occurrence of the injury controlled during the entire life of the claim, even as to the right of the beneficiary for the death occurring long after the injury. In the course of that opinion, the court said:

> "The second branch of appellant's argument is that her right to compensation did not arise from

her husband's injury, but from his death. With this we can hardly agree. Her right to recover may arise *at* his death, but it certainly arises from his injury. The death of her husband gives her no right whatever unless it be established that it arose from an injury under the act. So that, the injury itself is the real basis for allowance of compensation."

This court in *Mountain Timber Co. v. Washington,* 243 U. S. 219, pointedly observed:

"The statute, although approved March 14, 1911, took effect as between employers and workmen on October 1 in that year, actions pending and causes of action existing on September 30 being expressly saved. It therefore disturbed no vested rights, its effect being confined to regulating the relation of employer and employee in the hazardous occupations *in futuro.*"

There is nothing which the appellant could have done which would have brought him into the enjoyment of increased compensation until the increase in disability occurred. The circumstances here presented are no different than if the legislature had provided that, although when the injury occurred under the law then in force allowed $2250.00, he could receive but $240.00.

The change in question, within the rules announced in the authorities considering the question, invades the vested right of the appellant guaranteed under the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution.

The Supreme Court of Connecticut in *Preveslin v. Derby & Ansonia Developing Co.,* 151 Atl. 518, 112

Conn. 129, considered the question with the greatest care and announced its conclusion in the following language:

". . . The compensation under the Act of 1919 was substantially less than that under the Act of 1927, the later one being to the pecuniary disadvantage of the defendant. The validation of the Act of 1927, if effectual, would thus increase the amount the defendant would be required to pay over that required by the Act of 1919. The defendant's right of defense, which affected its substantial interests, became fixed in present enjoyment and available to the defendant under the statute in effect at the time of the injury and definitely ascertained upon the determination of the McCook case. It was a property right which vested in the defendant and for whose protection against legislative invasion in the form of a validating act or otherwise it could rely on Article First of our State Constitution and upon the Fourteenth Amendment of the Federal Constitution.

"In *Travelers Ins. Co. v. Ohler* (Nebraska), 227 N. W. 449, 450, the court held: 'A legislative act will not be permitted, even if an attempt so to do is disclosed, to operate retrospectively where it will have the effect to invalidate or impair the obligation of contracts or interfere with vested rights.' Ruling Case Law, Vol. 6, page 362, states the rule to be: 'But the legislature has no power by a subsequent curative statute to remedy a jurisdictional defect, or one which goes to the substance of a vested right.' Cooley, Const. Lim. (8th Ed.) 771, 745; *Dunlap v. Littell,* 200 Ky. 595, 255 S. W. 280. The only 'vested right' which will be protected by these constitutional provisions is one which rests upon equities and has regard for general welfare and public policy. The right of this

defendant to have the compensation determined by the Act of 1919, rather than to have it determined by the greater measure of compensation accorded by the Act of 1927, is a vested right of this character because it accrued prior to the passage of the Act of the Special Session.

"The Compensation Act of this State is contractual. General Statutes, Section 5342; Powers v. Hotel Bond Co., 89 Conn. 143, 145, 93 A. 245. The contract between plaintiff and defendant began with plaintiff's employment. The contract is to pay and accept such compensation as is prescribed by statute in effect at the date of the injury. Any legislation which purported to change a substantial term of this contract operative at the time of plaintiff's injury passed subsequent to its making would impair its obligation and fall within the ban of Article First of the Constitution of Connecticut and of Article First, Section 10, and the Fourteenth Amendment of the Federal Constitution. In holding an Act, as applied to a contract of insurance, void because it would impair its obligation in several particulars, we said: 'Any law which changes the intention and legal effect of the original parties, giving to one greater and to the other less interest or benefit in the contract, impairs its obligation. The extent of the change is immaterial. Any deviation from its terms by hastening or postponing the time of performance which it prescribes, or imposing conditions not included in the contract, or dispensing with the performance of those that are included, however small and unimportant they may appear to be in their effect, impairs the obligation of a contract. . . . The legislature may regulate the remedy and the method of procedure under a past as well as a future contract, but it cannot impose new restrictions upon the enforcement of a past contract, so as materially to lessen its value and benefit

to either party.' *O'Connor v. Hartford Accident & Indemnity Co.*, 97 Conn. 9, 14, 115 A. 484, 486. In a case where larger compensation was awarded under an Act passed subsequent to the accident than was provided by the law in force when the accident occurred, the court held: 'If such be the intention of the Act, it cannot under the plain provisions of both the Federal and State Constitutions be given that effect so far as concerns rights and obligations which accrued before its passage. . . . Upon the happening of an industrial accident the right to receive compensation becomes vested, and the obligation to pay it fixed. To change such vested rights and fixed obligations by statute could clearly be to impair the obligation of contracts.' *Gauthier's Case*, 120 Me. 73, 76, 113 A. 28-30. Under the accepted rule of this jurisdiction, retrospective laws which impair the obligation of contracts, or substantial vested rights, are in conflict with the Federal and State Constitutions."

The New Jersey court in *Baur v. Court of Common Pleas*, 95 Atl. (N. J.) 627, 629, considered a very similar question and decided:

"The Workmen's Compensation Act of 1911 did not contain any limitation on the time within which a petition for compensation in a case under the act may be filed. In 1913 the Legislature amended the Act of 1911, in that it required that in case of personal injuries or death all claims for compensation on account thereof shall be forever barred, unless within one year after the accident the parties shall have agreed upon the compensation payable under the act, or unless within one year after the accident one of the parties shall have filed a petition for adjudication of compensation as provided by the act. P. L. 1913, p. 314.

"The petitioner in the present case was in-

jured on the 24th day of November, 1911, while in the employ of the prosecutor, and filed his petition for compensation April 15, 1914, more than two years after the occurrence of the accident. The trial judge gave judgment for $342.20, payable at the present time, with interest from August 30, 1912.

" . . .

"If this be the effect of the amendment, then it is clear that it imposes a greater and different burden on the prosecutor than existed at the time his liability was incurred under the act of 1911, and to give force and effect to it in the present case would result in a clear violation of a vested right of the prosecutor. The compensation to be awarded in the case at bar must be made under and according to the provisions of the act of 1911."

The Supreme Court of Louisiana has spoken on it in *Salvaggio v. Illionis Cent. R. Co.,* 91 So. 549, 550. It said:

". . . It was intended to create a right of action where none existed before, and it could not be given a retrospective effect without violating the plainest principles of constitutional law. Cooley's Const. Limitations, 369.

" . . . The legislature could not enact a statute changing the conditions of a contract of employment in existence prior to the adoption of such statute."

And the Supreme Court of Utah in *United Iron Works v. Smethers,* 14 Pac. (2nd) 380, considered the question and announced its conclusion in the following language:

"It was clearly not the intent of the Legislature when it amended the Workmen's Compensa-

tion Law by the amendment in 1923, that it apply to accidental personal injuries occurring prior to enactment of said amendment. This would be retroactive, impair vested rights, and be unconstitutional.

"When the respondent received the accidental personal injury in the case at bar, the right for compensation became vested contingent upon compliance with the provisions of the act, and the obligation to pay under the existing law at that time was fixed. The amendment as contended for in the instant case would strike down the vested rights of the parties under the Workmen's Compensation Law. See Gauthier v. Penobscot Chemical Fiber Co., 120 Me. 73, 113 A. 28."

See also:

Mailman's Case, 118 Me. 175, 106 Atl. 606;

Regina Warner v. Arthur F. Zaiser, 184 Minn. 598, 239 N. E. 761;

Leon v. Crowell & Spencer, 92 So. 389, 390;

Associated Employers' Reciprocal v. Brown, 56 S. W. (2d Ser.) 483, 485;

Double v. Iowa-Nebraska Coal Co., 198 Iowa 1351, 201 N. W. 97;

Duff v. Black Diamond Collieries, 33 S. W. (2nd) 63, 161 Tenn. 486;

Halling v. Industrial Commission of Utah, 71 Utah 112, 263 Pac. 78.

CONTRACTUAL RIGHTS—OBLIGATIONS OF CONTRACT IMPAIRED

The allegation of the petition is that appellant as a result of the injury requires medical treatment on

account thereof. While it is said that the rights under the Washington compensation act are statutory, nevertheless, the statute creates a contract between the Department of Labor and Industries, the administrative tribunal charged with its administration, on the one hand, and the employer and the workman on the other. Section 7713, Rem. Rev. Stat. (Laws of 1923, p. 404, sec. 8), creates a medical aid fund for the purpose of furnishing medical care to injured workmen. That section, moreover, requires the employer to deduct one-half the medical aid premium from the workman. By the terms of Section 7714, the state guarantees out of the fund so collected proper and necessary medical and surgical services at the hands of a physician of his own choice.

The limitation in that section "such treatment shall not extend beyond the time when the award is made" does not apply when the case is reopened, for in that event the workman is entitled to full medical attention. In *Babic v. Department of Labor and Industries,* 156 Wash. 537, the Supreme Court of Washington held that when a case was reopened under such circumstances medical attention then followed as a matter of course. In return for the premiums paid, one-half by the employer and one-half by the workman, the State Insurance Company agreed to furnish full medical attention to the appellant in the event he was injured in the course of his employment. Such a right was held by this court in *Peterson v. Pacific Steamship Co.,* 278 U. S. 130, to be contractual. The amendment in ques-

tion denying him that right as it existed at the time of the injury impairs the contractual right of the appellant to recover such further medical attention in violation of the constitutional guarantee contained in Section 10 of Article I of the Federal Constitution.

See also:

Thorpe v. Department of Labor and Industries, 145 Wash. 498;

Hilding v. Department of Labor and Industries, 162 Wash. 168.

CONCLUSION

In conclusion we contend primarily that the amendment in question destroys the right and does not relate to the remedy. That the right to recover full medical attention necessitated by the injury is a contractual right of which appellant may not be deprived under the contract clause of Section 10, Article I of the United States Constitution, and that the right to recover compensation for a new or greater disability is a right vested in the appellant by the injury, of which he may not be deprived by legislative action because of the guarantees of the due process and equal protection clauses of the 14th Amendment. We, therefore, respectfully submit that the statute in question invades the rights of the appellant protected by those constitutional guarantees and that, consequently, the amend-

ment in question is void and the judgment appealed from should be reversed.

HARRY ELLSWORTH FOSTER,
PHIL K. EATON,
STANBERY FOSTER,
Counsel for Appellant.

APPENDIX

Section 7713, Rem. Rev. Stat.:

> A fund is hereby created in the state treasury to be known as the medical aid fund. Into it shall be paid by each employer on or before the fifteenth day of September, 1923, and on or before the fifteenth day of January, May and September of each year thereafter for each day's work or fraction thereof done for him in extrahazardous employment in or during the preceding four calendar months the medical aid rate provided in sections 7676 and 7712.
>
> The employer shall deduct from the pay of each of his workmen engaged in extrahazardous work one-half of the amount the employer is required by the foregoing provision of this section to pay into said fund for or on account of the employment of such workman.

Section 7714, Rem. Rev. Stat., so far as pertinent, is:

> Upon the occurrence, after June 30, 1923, of any injury to a workman entitled to compensation under the provisions of said sections 7673 to 7796, he shall receive in addition to such compensation, and out of the medical aid fund, proper and necessary medical and surgical services, at the hands of a physician of his own choice if conveniently located, and proper and necessary hospital care and services during the period of his disability from such injury, but the same shall be limited in point of duration as follows:
>
> In the case of permanent partial disability not to extend beyond the date when compensation shall be awarded him out of the accident fund, except when the workman returned to work before permanent partial disability award is made, in such case not to extend beyond the time when monthly allowances to him out of the accident fund shall

cease, in case of temporary disability not to extend beyond the time when the monthly allowances to him out of the accident fund shall cease, in case of a permanent total disability not to extend beyond the date on which a lump sum settlement is made with him or he is placed upon the permanent pension-roll. . . .

Table 4.—Compensation and Insurance Systems

State	Compensation Compulsory or Elective	State Fund: Exclusive or Competitive	Private Companies or by Self-Insurance
Alabama	Elective	.....	
Alaska	do	.....	
Arizona	Compulsory[1]	Competitive	Either
California	do	do	do
Colorado	Elective	do	do
Connecticut	do	.....	do
Delaware	do	.....	do
District of Columbia	Compulsory	.....	do
Georgia	Elective	.....	do
Hawaii	Compulsory	.....	do
Idaho	do	Competitive	do
Illinois	do	.....	do
Indiana	Elective[2]	.....	do
Iowa	do	.....	do
Kansas	do	.....	do
Kentucky	do	.....	do
Louisiana	do	.....	do
Maine	do	.....	do
Maryland	Compulsory	Competitive	do
Massachusetts	Elective	.....	Private Companies
Michigan	do	Competitive	Either
Minnesota	do	.....	do
Missouri	do	.....	do
Montana	do	Competitive	do
Nebraska	do	.....	do

Nevada	do	Exclusive	Self-Insurance
New Hampsire	do	———	Either
New Jersey	do	———	do
New Mexico	do	———	do
New York	Compulsory	Competitive	
North Dakota	do	Exclusive	
Ohio	do	do	Self-Insurance
Oklahoma	Compulsory	———	Either
Oregon	Elective	Exclusive	
Pennsylvania	do	Competitive	do
Philippine Islands	Compulsory	———	do
Porto Rico	do	Competitive	do
Rhode Island	Elective	———	do
South Dakota	do	———	do
Tennessee	do	Competitive	do
Texas	do	———	Private Companies
Utah	Compulsory	Competitive	Either
Vermont	Elective	———	do
Virginia	do	———	do
Washington	Compulsory	Exclusive	
West Virginia	Elective	do	Self-Insurance[3]
Wisconsin	do	———	Either
Wyoming	Compulsory	Exclusive	
United States longshoremen's act	do	———	do

[1]—As to employers.
[2]—Compulsory as to coal mining.
[3]—Employers accepting the act must furnish proof of solvency or give bond; no other provision as to insurance.